Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

LAWYER WHEELER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

Whether it was plain error to admit evidence of bankruptcy fraud in support of Count One alleging false and fraudulent statements under 18 U.S.C. § 1001 and whether this error amounts to a gross miscarriage of justice?

Whether it was plain error to convict petitioner of bank fraud under 18 U.S.C. § 1014 because discharge of indebtedness is not a "lending activity" and, if so, whether this represents a gross miscarriage of justice or whether, in the alternative, a direct conflict exists between Court of Appeal decisions and a decision of this Court?

Whether it was plain error to fail to submit the issue of materiality to the jury on Counts One and Two, the false statements charge under 18 U.S.C. § 1001 and the bankruptcy fraud change under 18 U.S.C. § 152, and whether this amounts to a gross miscarriage of justice or whether, in the alternative, this presents a direct conflict between the decision of the Fifth Circuit and a decision of this Court?

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PETITION FOR A WRIT OF CERTIORARI

Lawyer Wheeler respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-8a) is unreported. The judgment of the district court (App., infra, 9a-15a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on July 2, 1997 (App. infra, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The general false and fraudulent statements statute, 18 U.S.C. § 1001, at the time of petitioner's indictment and trial, in relevant part, stated that "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up, by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be

fined under this title or imprisoned not more than five years, or both."[1]

The bankruptcy fraud statute, 18 U.S.C. § 152, in relevant part, provides that "a person who . . . knowingly and fraudulently makes a false . . . statement . . . shall be fined under this title, imprisoned not more than five years, or both."

The statute criminalizing false statements for the purpose of influencing a financial institution, 18 U.S.C. § 1014, provides, in relevant part, that "whoever knowingly makes any false statements . . . for the purpose of influencing in any way the action of . . . the Farmers Home Administration . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than 1,000,000 dollars or imprisoned not more than thirty years, or both."

STATEMENT

On June 10, 1994, the Grand Jury for the Northern District of Mississippi indicted Lawyer Wheeler in a three count indictment. The charge under Count One was

[1] In 1996, after the defendant's conviction, the statute was amended to read " . . . whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States, knowingly and wilfully. . . . "

brought pursuant to 18 U.S.C. § 1001 which makes it a crime to make a false statement, either oral or written, to an agency of the United States government on a matter within the purview of that agency's jurisdiction with the intent to deceive or mislead about a material matter. Count One charged a scheme to defraud the Farmers Home Administration, an agency of the U. S. Department of Agriculture, by falsifying, concealing and covering up information concerning his income and assets.

The evidence presented at trial in support of this count was that Lawyer Wheeler, Sr., had filed a Petition under Chapter 7 of the Bankruptcy Laws seeking a discharge of his indebtedness owed to the Farmers Home Administration as well as other creditors. According to the government's case, Lawyer Wheeler omitted various assets and financial transactions from his bankruptcy statements and schedules which were filed in the Bankruptcy Court. Evidence was also presented that Lawyer Wheeler had filed an administrative petition for debt settlement with the Farmers Home Administration on behalf of his wife, Ruby Wheeler, and that this administrative petition also omitted various assets and financial transactions.

Count two of the indictment was brought under 18 U.S.C. § 152 and charged Lawyer Wheeler, Sr., with having fraudulently made a false oath to a material matter in a bankruptcy proceeding. The evidence presented against him on this count was that he had given sworn testimony at a 341 Creditors' Meeting to the effect that his statements and schedules filed in the bankruptcy proceeding were true and correct when he knew that they were not.

The third count of the indictment was brought against Mr. Wheeler under the general financial institution fraud statute, 18 U.S.C. § 1014, which, among other things, makes it a crime to cause a false statement to be made to an agency such as the Farmers Home Administration for the purpose of influencing agency lending transactions.

Mr. Wheeler was arraigned and entered a plea of not guilty to all counts. The matter was heard by a jury on June 5-9, 1995, which rendered verdicts of guilty on all three counts.

Wheeler was sentenced on November 28, 1995, to thirty-four (34) months imprisonment on each of counts 1, 2 and 3, to be served concurrently. In addition, Wheeler was fined $3,500 each on counts one and two and $3,000 on count three for a total fine of $10,000. He was also ordered to make restitution to the United States Department of Agriculture in the amount of $965,586.64 and to the Bank of Webb, Mississippi, in the amount of $148,034.62, for a total restitution of $1,113,621.26. The amount of restitution in both the case of the Farmers Home Administration and the Bank of Webb was the amount of unsecured debt owed to each which had been discharged in Mr. Wheeler's Chapter 7 liquidation bankruptcy.

REASONS FOR GRANTING THE PETITION

A. The Standard of Review

The judgment of the Fifth United States Circuit Court of Appeals affirming Mr. Wheeler's conviction was entered on July 2, 1997. Since none of them were raised in the trial court and two of the three were not raised before the Fifth Circuit Court of Appeals, this Court must review Mr. Wheeler's Petition for Writ of Certiorari under the "plain error" standard.

The "plain error" doctrine is codified in Rule 52(b) of the Federal Rules of Criminal Procedure which states that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." This court recently addressed this issue in *Johnson v. United States*.[2] Joyce Johnson had been convicted of violating 18 U.S.C. § 1623 which makes it a crime to "knowingly make any false material declaration" under oath before a grand jury. Johnson did not object, in accordance with then existing precedent, when the trial judge instructed the jury that materiality was a question for him to decide, and that he had determined that her statements were material.

This court applied the *Olano*[3] rule to Johnson's appeal and in so doing said the following:

> " . . . Rule 52(b) governs her direct appeal. The *Olano* test for applying Rule 52(b) requires that there be (1) error, (2) that is plain, (3) that affects

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[2] 117 S. Ct. 1544, 137 L.Ed.2d 718, 65 USLW 4305 (1997).

[3] *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993).

> substantial rights. If these three conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."[4]

After applying the *Olano* test, this court in *Johnson* found that the failure to submit the issue of materiality to the jury was plain error which affected the substantial rights of the defendant. However, this court went on to find that the error had not seriously affected the "fairness, integrity, or public reputation of judicial proceedings." In so doing, it said the following:

> "In this case the fourth question must be answered in the negative. Materiality was essentially uncontroverted at trial and has remained so on appeal. Johnson has presented no plausible argument that her false statement under oath – lying about the source of the money she used to improve her home – was somehow not material to the grand jury investigation."[5]

B. It Was Plain Error To Admit Evidence Of Alleged Bankruptcy Fraud In Support Of Count One

It was plain error to admit evidence of misrepresentations and omissions in Mr. Wheeler's bankruptcy statements and schedules in support of the count alleging false and fraudulent statements under 18 U.S.C. § 1001. It was

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[4] 117 S. Ct. at 1546.

[5] Id. *Johnson* was cited and followed by the Fifth Circuit in its July 11, 1997, decision in *United States v. Dupre*, 117 F.3d 810, 816-817 (5th Cir. 1997).

plain error because six months prior to Lawyer Wheeler's trial, this court in *Hubbard v. United States*[6] held that a bankruptcy court is not a "department or agency of the United States" within the meaning of 18 U.S.C. § 1001. Therefore, this court found that Hubbard's submission of false and fraudulent statements to a bankruptcy court was not punishable under 18 U.S.C. § 1001. Even though 18 U.S.C. § 1001 was amended in 1996 to broaden its language sufficiently to include bankruptcy courts within its parameters, such evidence presented to the Court in Mr. Wheeler's 1995 prosecution was plain error within the meaning of the *Olano* test, constitutes a "gross miscarriage of justice," and should be reversed on direct appeal.[7]

C. It Was Plain Error To Convict Petitioner Of Bank Fraud Under 18 U.S.C. § 1014 Because Discharge Of Indebtedness Is Not A "Lending Activity"

In count three of the indictment, Wheeler was convicted of bank fraud under 18 U.S.C. § 1014 for submitting a false application to the Farmers Home Administration for the purpose of influencing the Farmers Home Administration to discharge his wife's indebtedness on FmHA loans. The trial judge charged the jury as follows on this count:

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[6] 514 U.S. 695, 115 S. Ct. 1754, 131 L.Ed.2d 779 (1995).

[7] For a discussion of the 1996 amendment to 18 U.S.C. § 1001 see: *United States v. Oakar*, 111 F.3d 146, 151 (D.C. Cir. 1997). For the "gross miscarriage of justice" standard of review see: *Thompson v. City of Louisville*, 362 U.S. 199 (1960); and, *Washington v. United States*, 357 U.S. 348 (1958).

> "In order for you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following two elements beyond a reasonable doubt.
>
> First, that the defendant made or caused to be made a false statement to the Secretary of the Department of Agriculture acting through the Farmers Home Administration knowing that it was false, and secondly, that the defendant did so for the purpose of influencing the Farmers Home Administration to discharge Ruby S. Wheeler from the indebtedness of FmHA loans."[8]

In *United States v. Devoll*[9] the appellant challenged the jury charge on appeal because the court had instructed the jury that under 18 U.S.C. § 1014 the defendant need only have made the false statement for the "purpose of influencing some action to be taken" by the bank.[10] The Fifth Circuit reviewed the challenge under the "plain error" standard. It found that the jury charge was an error but not plain error because prior Fifth circuit precedent had found fraud under this statute to be sufficient if the perpetrator had intended to influence "any activity" of the institution.[11]

In rejecting the government's expansive reading of this statute, the Fifth Circuit announced a bright line rule which clearly limits conduct considered violative of this

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[8] Trial record at Volume 5, Page 1022.

[9] 39 F.3d 575 (5th Cir. 1994), *cert. denied*, 514 U.S. 1067, 115 S. Ct. 1701, 131 L.Ed.2d 563 (1995).

[10] 39 F.3d at 579.

[11] 39 F.3d at 580.

statute to conduct intended to influence a financial institution's "lending activities." In this regard the Fifth Circuit said:

> "In response to this challenge the government again contends that section 1014 does not require proof that a false statement was for the purpose of influencing a financial institution in connection with its lending activities. The government argues that we have adopted a broad formulation of section 1014 requiring only proof that a defendant's false statements were for the purpose of influencing an institution's actions in any way.
>
> We reject that interpretation and conclude, as previously noted, that section 1014 applies only to actions involving lending transactions. We do so for several reasons. First and foremost, that statutory language sufficiently specifies that the false representation or fraud must be made for a purpose connected with the various lending activities or practices of the financial institution. The legislative history of section 1014 provides further support for this view. With the codification of Title 18 in 1948, thirteen statutes that criminalized misrepresentation in loan requests to various credit dispensing agencies of the United States were collated in section 1014. As one court thereafter concluded, 'the main purpose of the statute and its predecessors has always been to protect lending institutions whose activities are important to federal policy.' Various committee reports that were produced when Congress considered amendments to the statute also reveal views of the statute as properly concerned with 'false statements in loan and credit applications,' 'false statements with

> loans or other similar transactions,' or 'fraud in credit transactions.' With this background we are not persuaded that the statute imposes liability whenever a defendant's false statement was intended to interfere with any activity of a financial institution. . . . "[12]

In footnote 15, the Fifth Circuit in *Devoll* made reference to the revisor's notes for the statute saying –

> "[T]he enumeration of 'application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan' . . . represents a composite of terms and transactions mentioned therein."[13]

It is contended that even under the "plain error" standard, the application filed on behalf of Mrs. Wheeler for debt settlement was not a "lending transaction" within the meaning of 18 U.S.C. § 1014. The purpose of § 1014 is to assist lending institutions in avoiding the making of bad loans on the basis of false and fraudulent loan applications. In this case, Mrs. Wheeler was not applying for a loan. All the loans had been made long before. What she was applying for was for forgiveness of indebtedness which under the Fifth Circuit's reading of § 1014 in the *Devoll* case does not meet the definition of a "lending activity." For this reason even under the "plain error" standard the appellant's conviction under count three of the indictment should be vacated.

The Fifth Circuit's interpretation of the statute in *Devoll* is consistent with this Court's decision in *Williams*

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[12] 39 F.3d at 579-580 (citations and footnotes omitted).

[13] 39 F.3d at 580.

v. United States.[14] In *Williams* when finding "check kiting" to be beyond the scope of the statute, this Court held that the statute, itself, should be narrowly construed and, in so doing, said:

> "Given this background – a statute that is not unambiguous in its terms and that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law – we believe that a narrow interpretation of § 1014 would be consistent with our usual approach to the construction of criminal statutes. The Court has emphasized that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' "[15]

D. It Was Plain Error Not To Submit The Issue Of Materiality To The Jury On Counts One And Two

In its review of Lawyer Wheeler's conviction, on the basis of *United States v. Gaudin*[16] the Fifth Circuit found that the trial court's failure to submit the issue of materiality to the jury on counts one and two was plain error

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[14] 458 U.S. 279, 102 S. Ct. 3088, 73 L.Ed.2d 767 (1982).

[15] 458 U.S. at 290, 102 S. Ct. at 3094.

[16] 515 U.S. 506, 115 S. Ct. 2310, 132 L.Ed.2d 444 (1995).

but it was not reversible under the plain error doctrine because the error, according to the Fifth Circuit, "did not affect Wheeler's substantial rights. . . . " Thus the Court said:

> "However, the error did not affect Wheeler's substantial rights; the outcome of the trial would have been the same had materiality been submitted to the jury. There was substantial evidence of materiality, including testimony that the Wheelers' debt was released as a result of the misstatements that they had no assets, income, or recent debt payments and that Wheeler intended this as the result of his misstatements."[17]

According to the Fifth Circuit's opinion in *United States v. McGuire*,[18] the following is the framework of analysis for determining whether a statement is "material:"

> "Deciding whether a statement is 'material' requires the determination of at least two subsidiary questions of purely historical fact: (a) 'What statement was made?'; and (b) 'What decision was the agency trying to make?'. The ultimate question: (c) 'Whether the statement was material to the decision,' requires applying the legal standard of materiality . . . to these historical facts. . . .
>
> [T]he statement must have 'a natural tendency to influence, or [be] capable of influencing, the

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[17] *United States v. Wheeler*, 5th Circuit Docket No. 95-60777, slip opinion at page 5. (7/2/97). See Appendix at App. 5-6.

[18] 99 F.3d 671 (5th Cir. 1996).

"decision of the decision making body to which it was addressed.' "[19]

The proof under count one, the general fraudulent statements statute, 18 U.S.C. § 1001, was that Lawyer Wheeler, Sr., had made various omissions in his bankruptcy statements and schedules filed with the Bankruptcy Court and he had also caused to be filed with the Farmers Home Administration an administrative application for debt settlement which likewise contained omission of various assets. The thrust of count one was that Lawyer Wheeler had entered into a scheme to defraud the Farmers Home Administration, not the bankruptcy court or the creditors in the bankruptcy proceeding. Therefore, as noted by the Court in *McGuire* that the statement in order to be material must have "a natural tendency to influence . . . the decision of the decision making body to which it was addressed," since the bankruptcy statements and schedules were addressed to the bankruptcy court and not to the Farmers Home Administration, as a matter of plain error, these should not even be considered in determining whether Lawyer Wheeler, Sr., is guilty of a violation under 18 U.S.C. § 1001.

This leaves the reviewing court with two questions: (1) whether the issue of materiality of the omissions in the administrative debt settlement petition made to FmHA, under the 18 U.S.C. § 1001 charge, should have been submitted to the jury; and, (2) whether the issue of materiality of the omissions from the bankruptcy statements and schedules, under count two which was the 18

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[19] 99 F.3d 671, 674 (5th Cir. 1996) (en banc, per curiam).

U.S.C. § 152 bankruptcy fraud charge, should have likewise been submitted to the jury?

Contrary to the Fifth Circuit panel's conclusion, Petitioner contends that although the trial record is replete with many omitted assets which may at one time during the relevant time frame have been in Mr. Wheeler's hands, the record is totally devoid of evidence concerning secured claims which, in all likelihood, existed against these assets. For example, much of the evidence against Mr. Wheeler concerned payment to him for various harvested crops. Common sense dictates that most farmers find it necessary to obtain a production loan to finance their crop production. The lender is then given a first lien against growing crops to secure repayment of the loan. The record tells us nothing about payment of these claims.

The purpose of a Chapter 7 liquidation bankruptcy is an orderly liquidation of the debtor's assets. If an asset has liens against it equal to or in excess of its value, this asset is normally "abandoned" from the bankruptcy estate by the Chapter 7 trustee. He does this because the only assets which the Chapter 7 trustee can liquidate to pay unsecured creditors are those assets which either have no liens against them or have liens which are sufficiently small to leave equity for liquidation and distribution after payment of the lienholder(s). After the asset has been "abandoned" from the bankruptcy estate, it may be treated as if it had never been involved in the bankruptcy. All the trial record shows are Lawyer Wheeler's assets. Without determining what liens existed against these assets, it is pure speculation as to what, if anything, might have remained for liquidation and distribution by the Chapter 7 bankruptcy trustee after payment of the liens.

If you believe that the liens against the assets omitted by Lawyer Wheeler from the bankruptcy statements and schedules and debt settlement application exceeded the value of the omitted assets, so that nothing would have been left for liquidation and distribution to the Farmers Home Administration and Lawyer Wheeler's other unsecured creditors, after payment of the lienholders; and, if you further believe that these omissions, therefore, would not have been capable of influencing the decision making of the Chapter 7 bankruptcy trustee and/or the Farmers Home Administration, then the omission of these assets was not "material." For this reason the Fifth Circuit's decision that there was "substantial evidence of materiality" is in error and is a "plain error" which has resulted in a "gross miscarriage of justice."

CONCLUSION

Because it raises substantial questions concerning a conflict between decisions of a circuit and this Court and also raises substantial questions of whether a gross miscarriage of justice has occurred, Lawyer Wheeler's petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60777

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAWYER WHEELER, SR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(94-CR-60-1)

(Filed July 2, 1997)

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Primarily at issue is the district court's not submitting the issue of materiality to the jury for charged violations of 18 U.S.C. §§ 1001, 1014, and 152. We ***AFFIRM.***

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I.

Lawyer Wheeler was convicted by a jury in 1995 on three counts: knowingly and willfully falsifying, concealing and covering up material facts to the Farmers Home Administration, in violation of 18 U.S.C. § 1001; knowingly and fraudulently making a false oath to a bankruptcy court, in violation of 18 U.S.C. § 152; and, knowingly and willfully causing to be made a materially false statement and report to influence the Farmers Home Administration, in violation of 18 U.S.C. §§ 1014 and 2.

The evidence showed that Wheeler had concealed his farming activities, assets, income, and debt payments in bankruptcy proceedings, had made false statements to the FmHA, and, concerning his wife's indebtedness to the FmHA, had caused false statements to be made to the FmHA in order to influence the FmHA to discharge indebtedness; that the trustee in bankruptcy relied on Wheeler's statements "without exception"; that the trustee's actions would have been different but for the misrepresentations; that Wheeler was granted complete discharge and release from his indebtedness on 30 August 1989; and that Wheeler's release from indebtedness by the FmHA was because the FmHA was under the impression that "[n]o assets remain[ed] from which the FmHA could expect to collect payment".

Following his conviction, Wheeler was sentenced, *inter alia*, to 34 months imprisonment on each of the three counts, to be served concurrently, and ordered to make restitution to the FmHA in the approximate amount of $1 million and to the Bank of Webb, Mississippi, in the

approximate amount of $148,000. His sentence was stayed pending this appeal.

II.

Wheeler properly raises four issues: (1) that the issue of materiality should have been submitted to the jury; (2) that the district court erred in altering or broadening the indictment by allowing conviction for conduct only partially, instead of solely, intended to defraud the FmHA; (3) that the evidence was insufficient to prove that Wheeler's wife, Ruby Wheeler, had committed a criminal offense to support wheeler's 18 U.S.C. § 2 conviction; and (4) that the order of restitution to the Bank of Webb was impermissible.

In addition, Wheeler raises for the first time in his reply brief the contention that the amount of restitution to the FmHA (approximately $1 million) was excessive. Pursuant to our usual rule, we decline to review this untimely issue; among other things, the Government did not have an opportunity, pursuant to the required briefing schedule, to respond. And, there is no manifest injustice. ***Kansas Reinsurance Co., Ltd. v. Cong. Mortgage Corp. of Tx.***, 20 F.3d 1362, 1370 n.8 (5th Cir. 1994) (refusing to review issue raised in reply brief absent "manifest injustice").

A.

Wheeler contends that, for each of the three counts, the failure to submit to the jury the issue of the materiality of his misstatements violates ***United States v.***

Gaudin, 115 S. Ct. 2310 (1995) (materiality a jury question for 18 U.S.C. § 1001 violation).

1.

First, as held last February, materiality is not an element of the § 1014 violation at issue in count three. ***United States v. Wells***, 117 S. Ct. 921, 926-27 (1997). In ***Wells***, however, the Court remanded for consideration whether, despite the superfluity of the trial judge's finding of materiality, his statement to the jury that

> [t]he materiality of the statement . . . alleged to be false . . . is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant,

impermissibly adversely affected the jury's "falsity" and "purpose" findings. ***Wells***, 117 S. Ct. at 931. In the case at hand, the district court gave a somewhat similar instruction:

> [Despite count three charging a materially false statement] you need not consider whether any false statement was a material false statement.

Wells was decided after the briefing in this case. (Wheeler raised this point for the first time at oral argument.) Nevertheless, Wheeler had no reason to believe that the trial court's explanation of materiality to the jury, regardless of that element's inclusion to § 1014, would not adversely affect the jury. Accordingly, he had no reason not to object to the instruction at trial and to brief the point on appeal. Because the issue was not briefed on appeal, we will not address it. FED. R. APP. P. 28(a)(6);

Trust Co. of La. v. N.N.P., Inc., 104 F.3d 1478, 1485 (5th Cir. 1997).

2.

With respect to counts one and two, Wheeler did not object at trial to the court's failure to submit the materiality issue to the jury. Therefore, we review only for plain error: Wheeler must show error; that is plain; and that affects substantial rights; and, even then, we will correct the error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings. ***United States v. Olano***, 507 U.S. 725, 730-31 (1993). Moreover, as the Supreme Court held recently in ***United States v. Johnson***, 117 S. Ct. 1544 (1997), and as this court had held earlier in ***United States v. Jobe***, 101 F.3d 1046 (5th Cir. 1996), we will review for plain error a point, not erroneous at the time of trial, if there is an intervening change in the law while appeal is pending. Pursuant to ***Gaudin***, as discussed *supra*, there was error as to the § 1001 charge in not submitting materiality to the jury, and this error is now "clear" or "obvious". As to the other count, in that 18 U.S.C. § 152(2) involves "knowingly and fraudulently mak[ing] a false oath or account in or in relation to any case under title 11", we will assume for purposes of this opinion that, for conviction, the oath or account must be "material" and that, therefore, for purposes of the § 152 charge, there was also "error" that is "clear" or "obvious".

However, the error did not affect Wheeler's substantial rights; the outcome of the trial would have been the same had materiality been submitted to the jury. There

was substantial evidence of materiality, including testimony that the Wheelers' debt was released as a result of the misstatements that they had no assets, income, or recent debt payments and that Wheeler intended this as the result of his misstatements.

B.

The indictment charged in count one that, in violation of § 1001, Wheeler used a scheme of material facts to mislead the FmHA into releasing his debt. Over Wheeler's objections, proof was admitted concerning other debts and the jury was charged that Wheeler was in violation of § 1001 if his "intent [was] in whole or in part to defraud the FmHA". Wheeler contends that such evidence and the jury charge impermissibly altered and broadened the indictment by allowing a conviction for fraud against other victims. We disagree.

The indictment charged that Wheeler intended to defraud the FmHA, and the jury was required to find that Wheeler had intended to do so. If, in addition, it found that Wheeler *also* intended to defraud others, this does not undermine the fact that Wheeler intended the FmHA to be one of his victims, nor does it alter the indictment – it charged that the intent was to defraud the FmHA, *not* that the *sole* intent was to defraud the FmHA.

C.

Count three charged Wheeler with *making, and causing to be made,*

> a materially false statement and report for the purpose of influencing the actions of the [FmHA] on an application for settlement of indebtedness of Ruby S. Wheeler . . . in violation of Sections 2 and 1014, Title 18.

Wheeler contends, erroneously, that he was charged with a § 2(b) violation only, and that such a violation requires that the jury find that Ruby Wheeler had committed a criminal offense.

There is some support for the proposition that a § 2 "aiding and abetting" violation requires proof of the guilt of the person aided; but, as here, under the *"causing"* prong of § 2, "there is no requirement of shared intent; only the person charged need have the criminal intent, [and] the individual whom the defendant has caused to perform the act may be entirely innocent". ***United States v. Levy,*** 969 F.2d 136, 141 (5th Cir.), *cert. denied,* 506 U.S. 1040 (1992); *but see* ***United States v. Beuttenmuller,*** 29 F.3d 973 (5th Cir. 1994) ("aiding and abetting" requires proof of underlying crime, the commission of which was aided or perpetrator of which was abetted).

In any event, Wheeler was charged under § 2 *and* § 1014 with "causing" the misstatements on Ruby Wheeler's application (placing the information on the document and delivering it to the FmHA), not aiding and abetting *her* commission of a crime. Therefore, no proof of her wrongdoing was necessary.

D.

Wheeler's contention that the order of restitution to the defrauded Bank of Webb was impermissible because

the indictment did not charge fraud on that Bank likewise fails. Under the Victim and Witness Protection Act, "[t]he court . . . may order . . . that the defendant make restitution to *any* victim of the offense". 18 U.S.C. § 3663 (emphasis added). Moreover, a district court may award restitution under the Act "for the loss caused by the specific conduct that is the basis of the offense of conviction". ***Hughey v. United States,*** 495 U.S. 411, 412 (1990). But, neither the statute, nor ***Hughey,*** limits restitution to victims listed in the indictment, so long as the additional victims were harmed as a result of the charged conduct. *See also* ***United States v. Pepper,*** 51 F.3d 469, 473 (5th Cir. 1995).

There is little doubt that Wheeler's false declaration in bankruptcy court caused the Bank harm. His debt to the Bank was discharged as a direct result of the bankruptcy proceedings, which were classified "no asset" proceedings as a result of Wheeler's misstatements.

III.

For the foregoing reasons, the judgment is

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN District of MISSISSIPPI

UNITED STATES OF AMERICA

v.

LAWYER WHEELER, SR.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Dec. 5, 1995)

Case Number: 2:94CR000060-B-001

RONALD LEWIS
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[ ] pleaded nolo contendere to count(s) _____ which (was) (were) accepted by the court.

[XX] was found guilty on count(s) 1, 2, & 3 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 USC 2 & 1001	False Statements and/or Concealment of Material Facts by Trick/Scheme	12/8/89	1
18 USC 152	False Oath/Claims in Relation to Title 11 Case	6/13/89	2
18 USC 2 & 1014	False Statements to Influence FmHA	11/21/89	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
312-30-4943

Defendant's Date of Birth:
11/20/29

Defendant's USM No.:
10109042

Defendant's Mailing Address:
632 Page Ave.
Clarksdale, MS 38614

Defendant's Residence Address:
Same

November 28, 1995
Date of Imposition of Judgment

/s/ Illegible
Signature of Judicial Officer

Neal B. Biggers, Jr., U.S. District Judge
Name & Title of Judicial Officer

12/4/95
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 34 months . This term consists of terms of 34 months on each of Counts 1, 2, and 3, such terms to be served concurrently.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ____ a.m./p.m. on ____.
[ ] as notified by the United States Marshal.

[XX] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[X] before 2 p.m. on January 2, 1996.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each of Counts 1, 2, and 3, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

[X] While on supervised release, the defendant shall not possess a firearm or destructive device. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions:

See page 3(a) attached for additional conditions.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occassioned [sic] by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

1. The defendant shall provide the probation officer with access to any requested financial information.

2. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Fine	Restitution
1	$50	$3,500	$482,793.32
2	$50	$3,500	$148,034.62
3	$50	$3,000	$482,793.32
Totals:	$150	$10,000	$1,113,621.26

FINE

The fine includes any costs of incarceration and/or supervision.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution	Priority Order of Payment
USDA, Rural Economic Community Development (RECD) Formerly FmHA	$965,586.64	
Bank of Webb	$148,034.62	

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column above.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:

[X] in full immediately.

[ ] in full not later than _____.

[ ] in ____ installments of $ ____ over a period of ____ to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration.

[ ] in installments to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration. During a period of probation or supervised release supervision payment of any unpaid balance shall be a condition of supervision and the U.S. probation officer shall establish and may periodically modify the payment schedule provided that the entire financial penalty is paid no later than the termination of supervision but in no event no later than 5 years after release from incarceration.

[ ] The defendant shall pay the costs of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States.

All financial penalty payments are to be made to the ~~Clerk of Court,~~ U.S. Courts National Fine Center except

those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (~~see attachment, if necessary~~). that the Court adds $148,034.62 to the restitution figure listed in the presentence report and orders that restitution also be made to the Bank of Webb in said amount. See * below.

Guideline Range Determined by the Court:

Total Offense Level: 19

Criminal History Category: I

Imprisonment Range: 30 to 37 months – Counts 1, 2, & 3

Supervised Release Range: 2 to 3 years – Counts 1, 2, & 3

Fine Range: $ 6,000 to $ 1,000,000

[ ] Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ 1,113,621.26

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range.

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

*The Court's rulings as to the filed objections are as follows:

-Governments objection #184-overruled in part, granted in part (Bank of Webb to be included re: restitution)
-Governments objection #2&3-overruled
-Governments objection #5-sustained (re: Bank of Webb restitution)
-Defendant's objection #1,2,3,4,5,6,7,8,&9 (all objections)-overruled.